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No. 94-1300

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTIS GUIDRY,
Petitioner,
v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9

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QUESTIONS PRESENTED

I. Should this Court review the 10th Circuit's determination that the "law of the case" doctrine did not require a holding that Guidry's pension benefits are exempt from garnishment after they have been paid to him and deposited in his bank account?

II. Should this Court review the 10th Circuit's ruling that ERISA's anti-alienation provision does not exempt from garnishment benefits after receipt by the pensioner?

III. Should this Court grant certiorari to determine whether Guidry is entitled to attorneys' fees against the Union under ERISA's attorneys' fee statute, when the Union's action against Guidry was not premised upon ERISA.

IV. Should this Court grant certiorari to determine the applicability and meaning of a Texas state exemption statute?

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PERTINENT STATUTES AND REGULATIONS

Texas Property Code Title 5 § 42-0021(a) and (c) provides as follows:

> (a) . . . . a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan . . . is exempt from attachment, execution, and seizure for the satisfaction of debts.

> (c) Amounts distributed from a plan or contract entitled to the exemption under Subsection (a) are not subject to seizure for a creditor's claim for 60 days after the date of distribution if the amounts qualify as a nontaxable rollover contribution under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986.

The U.S. Department of Treasury Regulations 29 C.F.R. § 1.401(a)-13 provide as follows:

> (b) No assignment or alienation.—(1) General rule. Under § 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.
>
> (c) Definition of assignment and alienation.—(1) In general. For purposes of this section, the terms "assignment" and "alienation" include— . . . .
>
> (ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

STATEMENT OF THE CASE

In 1982, Curtis Guidry, chief executive officer of Sheet Metal Workers International Association Local 9 ("the Union") pled guilty to embezzling more than $377,000.00 from the Union in violation of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501(c). He thereafter sued two of the respondent pension plans under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., claiming they had wrongfully refused to pay him pension benefits. The Union intervened, joined the third pension plan and asserted six claims against Guidry, one under the LMRDA

supra, and five under state law theories claiming Guidry's liability for the embezzlements. Guidry and the Union then stipulated to entry of a $275,000.00 judgment against Guidry. The District Court ordered the pension funds liable to Guidry for his pensions, but subjected those benefits to a constructive trust in favor of the Union until the Union's judgment and interest thereon were satisfied. The United States Court of Appeals for the Tenth Circuit affirmed District Court, and this Court granted certiorari to review the Tenth Circuit's original decision.

Hence, when this Court considered this case initially, Guidry had received no pension benefits. Guidry's continuing benefits were accruing in the constructive trust established by the District Court. However, on January 17, 1990, this Court held that the constructive trust violated ERISA's anti-alienation provision, ERISA § 206(d) (29 U.S.C. § 1056(d)(1)). The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its opinion. *Guidry v. Sheet Metal Workers National Pension Fund et al.,* 493 U.S. 365 (1990), hereinafter, *Guidry I.*

Following remand, the District Court ordered the pension plans to deliver Guidry's pension benefits to him and Guidry sought attorneys' fees against the Union based upon his successful *defense* under ERISA. In a Memorandum Opinion and Order dated December 31, 1990, the District Court denied Guidry's claim for attorneys' fees holding that the ERISA attorneys' fees statute, 29 U.S.C. § 1132(g)(1) did not apply to the Union since the Union's action against Guidry was brought under the LMRDA and not ERISA. Guidry did not appeal this denial of attorneys' fees.

The Union sought to obtain Guidry's pension benefits through legal process immediately after their delivery. First, the pension funds tendered the benefits in Texas. Appendix A-72-A-75. When that episode became the subject of legal dispute, the parties stipulated that all past

and ongoing pension benefits would be deposited into a bank account in Denver, Colorado, subject to a writ of garnishment issued May 1, 1991 pending the District Court's final disposition of Guidry's claims for exemption from the garnishments. Appendix A-76-A-81.

The District Court held that all of the funds deposited in Guidry's Denver account were exempt under ERISA's anti-alienation provision and that this result was mandated by the "law of the case" in *Guidry I*. Appendix A-69. In view of this finding, the District Court held Guidry's claims for exemption under Texas and Colorado law inapplicable. Appendix A-69-A-70. The Court denied plaintiff's second claim for attorneys' fees under ERISA, based upon the collection efforts after the District Court's December 31, 1990 Order denying attorneys fees, again noting that the Union's action against Guidry was based upon the LMRDA, not ERISA, and that it would be inequitable to award attorneys' fees in any event. Appendix A-70.

A three judge panel of the Tenth Circuit Court of Appeals, with one judge dissenting, held that the "law of the case" doctrine did not apply, since this Court did not decide the issue of the scope of ERISA's anti-alienation provision in relation to benefits which had already been paid to the beneficiaries, as no such benefits *had been* paid to Mr. Guidry at the time of *Guidry I*. Appendix A-9. Relying upon Department of the Treasury Regulations defining assignment and alienation as legal process "enforceable against the plan" the panel further held that ERISA's anti-alienation provision does not extend to benefits already paid from the plan. Appendix A-15-A-27. The Court held Guidry's claim for a Texas exemption moot since the pension funds under consideration were held in a Colorado bank under a Colorado writ of garnishment, and held the relevant Colorado statute preempted by ERISA. Appendix A-32-A-33. Likewise, it held Guidry's appeal for attorneys' fees moot, since he

was not the prevailing party on his ERISA defense. Appendix A-36.

The Tenth Circuit Court of Appeals en banc affirmed the holding of the panel on the ERISA issue. Appendix A-46. However, the Court applied the Colorado wage exemption statute, C.R.S. § 13-54-104(2)(a), and held 75% of the deposited funds to be exempt. Appendix A-50-A-60. The Court also held the Texas Exemption Statute inapplicable to the Colorado Garnishment (Appendix, A-60-A-61) and affirmed the District Court's ruling denying attorneys' fees. (Appendix, A-61 n.11).

GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED IN THIS COURT

I. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' REFUSAL TO APPLY THE "LAW OF THE CASE" DOCTRINE, WHICH DOCTRINE HAS BEEN CLEARLY ENUNCIATED BY THIS COURT.

Contrary to Guidry's contention, this Court need not grant certiorari in this case to enunciate the doctrine that lower courts must follow the decisions of higher courts in the judicial hierarchy. This proposition is so well known and routinely applied, it requires little embellishment. This Court has explained the doctrine succinctly as follows:

> When a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the Decree as the law of the case; and must carry it into execution, according to the mandate. . . . But the Circuit Court may consider and decide any matters left open by the mandate of this court;

Re: Sanford Fork & Tool Co., 160 U.S. 247, 255 and 256 (1895). More recently, this Court reasserted that the doctrine of "law of the case" comes into play only with respect to issues previously determined. *Quern v. Jordan,* 440 U.S. 332, 347, n.18 (1979).

Thus, the Tenth Circuit had to decide whether *Guidry I* had determined the applicability of ERISA's anti-alienation provision to benefits after they had been received by the plan beneficiary and deposited in his bank account. In its thorough treatment of this issue in the panel decision, the Court of Appeals correctly held that *Guidry I* did not decide the issue, either directly or by implication.

First, the *Guidry I* court did not *directly* determine whether the anti-alienation provision exempted benefits in the hands of the pensioner, because that issue was not before it. When this Court decided *Guidry I*, all pension benefits had been deposited into a constructive trust in accordance with the District Court's original order. Guidry had received none of the pension benefits at issue. Whether pension benefits may be garnished after they have been disbursed by the plan presents substantial legal questions distinct from the issue in *Guidry I*—whether a constructive trust could be imposed to intercept the benefits before they reached Guidry at all. The parties did not brief the former issue and this Court did not consider or decide it. While *Guidry I* points out that the anti-alienation clause reflects a decision to safeguard a "stream of *income*," [emphasis supplied] the decision nowhere expresses any restraints upon the disposition of that income once in the hands of the beneficiary.

Second, Guidry selects short excerpts from the Court's decision in *Guidry I* which he contends *imply* the result he seeks. However, the entirety of the Court's opinion must be viewed in the context of the factual circumstances which obtained at the time. In holding that ERISA's anti-alienation provision is consonant with other statutory provisions designed to safeguard retirement income, the Court so held only with respect to the receipt of that income, and not its destiny after receipt. Likewise, the phrase "stream of income" refers to a flow of funds *to* the pensioner without implicating the legal status of the funds after receipt.

As the Tenth Circuit correctly points out, exemption statutes fall broadly into two categories. Some cover only funds which are owed to the creditor while in the possession of a third party and others also cover the funds after receipt by the creditor from the third party.[1] In *Guidry I*, this Court did not prematurely determine into which of these two categories ERISA's anti-alienation provision fell. That determination involved complicated factors which this Court did not consider, because the issue was not before it. A grant of certiorari here would do nothing to elucidate the already clear principle that the "law of the case" doctrine applies only to issues previously determined by the higher Court.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE TENTH CIRCUIT'S HOLDING, UPON WHICH ALL JURISDICTIONS CONSIDERING THE ISSUE AGREE, THAT ERISA'S ANTI-ALIENATION CLAUSE DOES NOT EXEMPT BENEFITS AFTER PAYMENT.

Since this Court's decision in *Guidry I*, at least two other Federal circuits besides the Tenth Circuit and two state supreme courts have considered the reach of ERISA's anti-alienation provision to paid benefits. Every jurisdiction which has considered the issue has agreed with the Tenth Circuit that ERISA does not prohibit the alienation of benefits under the dominion of the pensioner.[2]

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[1] The Social Security Act, 42 U.S.C. § 407 is an example of the latter type of statute. *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). The Federal Consumer Credit Protection Act (15 U.S.C. §§ 1672 and 1673) is an example of the former. *Usery v. First National Bank*, 586 F.2d 107 (9th Cir. 1978).

[2] The Third Circuit expressly agreed with the holding of the 10th Circuit panel decision in the present case in *Trucking Employees of New Jersey Welfare Fund Inc. v. Colville*, 16 F.3rd 52 (3rd Cir. 1994). The Fourth Circuit, in an unpublished per curium opinion, *Nationsbank of North Carolina v. Shumate* (1994 U.S. App. Lexis 36695), affirmed a similar holding of the District Court in *NC&B Financial Services, Inc. v. Shumate*, 829 F. Supp. 178 (W.D. Va. 1993). In accord, *Fickhoff v. Eickhoff*, 263 Ga. 498, 435

In contrast, Guidry can point to no jurisdiction which has adopted his theory that ERISA's anti-alienation provision exempts benefits under the dominion of the pensioner. The lower courts have been unanimous in rejecting Guidry's theory, because it is inconsistent with the statutory language of ERISA itself as well as its interpretive regulations.

The anti-alienation clause itself does not exempt any pension benefits, but requires *pension plans* to provide that plan benefits may not be assigned or alienated. 29 U.S.C. § 1056(d)(1). Accordingly, ERISA requires the plans to establish restrictions in the nature of spendthrift trusts. A spendthrift trust restricts the transfer, assignment or alienation of the beneficiary's right to future payments of income or principal from the trust, but does not exempt benefits once paid to the beneficiary, since private trustors lack the authority to influence the disposition of funds after they are paid from the trust. Erwin N. Griswold, *Spendthrift Trusts,* Matthew Bender, Second Edition, 1947 § 370, page 454. Thus, Congress' failure to proscribe directly the alienation of plan benefits compels the conclusion that after the plans have paid benefits, funds are no longer subject to ERISA's anti-alienation requirement.

The Treasury Department regulations interpreting ERISA confirm this view.[3] While the regulations broadly prohibit the assignment and alienation of plan benefits, they define assignment and alienation as "a right of interest enforceable *against the plan. . . .*" 29 C.F.R. § 1.401(a)-13(b) and (c). [Emphasis supplied] Had the administrative agency construed ERISA to exempt

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SE.2d 914 (1993) and *Brosamer v. Mark*, 561 N.E. 2d 767 (Ind. 1990).

[3] This Court relied upon the Treasury Department regulations in reaching its conclusion in *Guidry I*. See *Guidry I*, 493 U.S. at 371, fn. 10.

benefits in the hands of the beneficiary, it would have defined assignment and alienation to include the enforcement of legal process against the plan beneficiary.

This Court need not grant certiorari only to confirm what has become a correct and uniformly accepted principle of federal law, that ERISA's anti-alienation provision covers only funds in the plan and not those paid to the beneficiary. A Supreme Court holding to this effect would serve no salutary purpose.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE DENIAL OF AN AWARD OF ATTORNEYS' FEES AGAINST THE UNION.

After the remand from this Court in 1990, Guidry sought attorneys' fees against the Union and the pension funds in the District Court. In a Memorandum Opinion and Order dated December 31, 1990, the District Court denied Guidry's Motion for Attorneys' Fees against the Union and the plans. Regarding the Union, the Court stated that since the litigation between the Union and Guidry was based upon the LMRDA, the ERISA fee statute, 29 U.S.C. § 1132(g)(1), was not applicable to the Union. Guidry did not appeal the District Court's denial of attorneys' fees at that point. Therefore, Guidry's present claim for attorneys' fees must be based entirely on the collection litigation since the District Court's December 31, 1990 Order.

Thereafter, the Union pursued various collection efforts against Guidry resulting in stipulations between the parties designed to facilitate a decision on the principal issues. Then, in its Findings, Conclusions and Order on post judgment issues of January 8, 1992, the District Court, while ruling in favor of Guidry on those post judgment issues, denied his Motion for Attorneys' Fees against the Union, again noting that 29 U.S.C. § 1132(g) is inapplicable to the union since its claim against Guidry was based upon the LMRDA. Appendix A-70.

The District Court was correct in its holding that the Union's action against Guidry and its subsequent collection efforts do not constitute an action under ERISA for which attorneys' fees may be awarded under 29 U.S.C. § 1132(g), and further did not abuse its discretion in deciding that Guidry would not be entitled to an award of fees under ERISA's balancing test for such awards in any event. See Brief of Respondent Pension Funds in Opposition to Writ of Certiorari.

IV. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE THE APPLICABILITY AND MEANING OF THE TEXAS EXEMPTION STATUTE.

According to the parties' stipulation, the pension funds attempted delivery of Guidry's past due pension benefits in Houston, Texas on March 7, 1991. (Appendix A-73, ¶ 6). Guidry did not accept that attempted delivery. (Appendix A-74, ¶ 9). Guidry contended that no delivery resulted from the events of March 7, 1991 (Appendix A-77, ¶ 1). The parties then stipulated to remove the money tendered to Guidry in Texas from the Registry of the United States District Court in Texas to a bank account in Denver, Colorado where it would be subject to garnishments served by the Union. (Appendix A-77 and 78, ¶¶ 3 and 4). The parties further stipulated that Guidry asserted a Texas state law exemption with regard to the funds derived from the Texas action. (Appendix A-79, ¶ 4).

The Tenth Circuit found the Texas exemption statute inapplicable for a number of reasons. Guidry never was able to explain how a Texas exemption statute would apply to an attempted delivery of funds in Texas that he himself contends was unsuccessful. The stipulation which allows Guidry to *assert* the Texas exemption, does not bind the Court to find it applicable. Although Guidry now argues that the stipulation itself established the applicability of the Texas state law, this Court should not grant

certiorari for the purpose of construing a stipulation between the parties.

Furthermore, even if this Court were to adopt Guidry's view of the stipulation, it would then be faced with construing the Texas statute as a matter of first impression, and were it to do so, it would have to conclude against Guidry in any case. The statute does not exempt pension benefits after they are received. It exempts only "a person's right to the assets held in or to receive payments under. . ." a pension plan. Tex. Prop. Code Title 5, § 42-0021(a). This language clearly does not cover benefits after they are received. Furthermore, subsection (c) of the same Texas statute confirms this view, since it specially exempts distributions from a plan if they qualify as a nontaxable rollover for a period of only 60 days after the date of distribution. Subsection (c) of the statute would be superfluous if the statute generally exempted pension benefits after receipt by the pensioner for an unlimited period.

In sum, this Court should not utilize its powers of review to determine the applicability of a Texas statute or to interpret such a statute for the first time. Those questions are better left to the lower courts for determination.

CONCLUSION

This case presents no sound basis for exercise of the Court's discretionary right of review. The "law of the case" doctrine is longstanding and straightforward and requires no further explication by this Court. Furthermore, this Court need not review the scope of ERISA's anti-alienation provision which is agreed upon unanimously by those lower courts which have ruled on the issue. Also, it would be an unwise exercise of this Court's power of review to construe the ERISA attorneys' fees statute when the sole ERISA issues concerning the union were raised as defenses. Finally, this Court should not exercise its discretion to consider the Texas exemption

statute when there has been no consideration of that statute in a lower court, and the plain meaning of the statute is contrary to Guidry's claim.

For the above stated reasons, the petition should be denied.

Respectfully submitted,

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